ONG CHONG WAH & ANOR

v.

SEYHUAT SDN BHD

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[CIVIL SUIT NO: 22-261-1999]
20 AUGUST 2001

CONTRACT: *Sale and purchase of land - Implied term - Land purchased for purpose of building bungalow house - Portion of land consisted of slope unsuitable for building purposes - Whether term to be implied that land must be flat land and suitable for building bungalow house - Applicable test - Shirlaw v. Southern Foundries (1926) Ltd*

CONTRACT: *Breach - Specific performance - Damages - Sale and purchase of land - Land purchased for purpose of building bungalow house - Portion of land consisted of slope unsuitable for building purposes - Whether there was breach - Whether defendant liable - Quantum*

By a sale and purchase agreement dated 29 April 1995 ('the agreement'), the plaintiffs purchased 14,681.96 sq feet of land ('the land') from the defendant at a price of RM14 per sq foot. The land was purchased for the specific purpose of building a bungalow house thereon. Having executed the agreement, the plaintiffs paid the defendant RM205,547.44 being the full purchase price of the land. Subsequently, however, the plaintiffs discovered that some 5606 sq feet of the land was actually hill slope ('the slope') that was utterly unfit for building purposes. The plaintiffs contended that the existence of the slope constituted a breach of the agreement on the part of the defendant, and that it was an implied term of the agreement that they were entitled to 14,681.96 sq feet of 'buildable' area or flat land on which to build their house. That being so, the plaintiffs sued the defendant for specific performance and damages.

It was not in dispute that the mock up of the land indicated that the land was a flat land. It was also not disputed that the agreement did not make any reference whatsoever to the slope, but stipulated, by its cl. 6.3.1 that the plaintiffs were liable to erect retaining walls on the land.

The defendant argued there was no breach of the agreement as: (i) there was no promise to sell a bungalow lot with 14,681.96 sq feet of flat land to the plaintiffs; (ii) notwithstanding the slope the plaintiffs still obtained 14,681.96 sq feet of land they had bargained for; (iii) By cl. 6.1.3 of the agreement, the

parties must have tacitly agreed that there would be slope on the land; and (iv) the agreement was complete, effective and workable without the term which the plaintiffs had wanted the court to imply. The main issue that arose was whether a term ought to be implied into the agreement that the entire land sold to the plaintiff must be flat land.

Held:

[1] In resolving the issue herein, the principle is that the court cannot rewrite the sale and purchase agreement executed by the plaintiffs and the defendant. The court would only imply such terms as may be necessary to render the agreement effective or complete in the manner in which the parties were presumed to have intended. (p 705 f)

[2] Going by cl. 6.1.3. and para. 3.1 in the seventh schedule of the agreement, the parties must have agreed that the land would be on a high ground. Since the land would be on high ground there would be slope on the land. In the circumstances, the purpose of the retaining walls, which the plaintiffs were obliged to build, was to retain and strengthen the slope so that it would not collapse onto the terrace houses at the foot of the slope. (p 707 g-h)

[3] The presence of the slope, and the reduction of the total area of the land, were two different things. Consequently, the fact that the land was on a hill, that there would be a slope and that retaining walls would have to be built does not mean that the defendant could reduce the land area available for construction. (p 708 b-c)

[3a] Further, in order to be representative of the contracting parties' intention that the 14,681.96 sq feet was inclusive of 5606 sq feet of the slope, there must be express provision to that effect. The mere mention of "retaining wall" and "slope" in the agreement is not sufficient to convey that intention. (p 713 b)

[4] The contract entered into between the parties is of a type in which the buyer expects the whole area to be flat land. The plaintiffs clearly did not intend to buy a plot in respect of which 5606 sq feet would be sloped land, which would entail substantial expenses to make the entire land available and ready for construction. In the circumstances, the plaintiffs were entitled under the agreement to obtain 14681.96 sq feet of land suitable not only to build their bungalow but also to do landscaping and other things necessary to enable them to enjoy and use the land as registered owners. (p 714 c)

[5] Considering the agreement herein, the purpose for which the land was bought and the applicable test as enunciated in *Shirlaw v. Southern Foundries (1926) Ltd*, the term that the entire 14861.96 sq feet of land under the agreement must be flat land is necessary to make the agreement effective and complete. It is a term which must have been too clear or obvious to the plaintiffs and the defendant. In the result, it was an implied term of the agreement that the entire area of the bungalow plot to be delivered to the plaintiffs must, at the time of delivery, be flat land that is fit, suitable and ready for construction of the intended bungalow house. Hence, by delivering to the plaintiffs the plot of land with 5606 sq feet of slope, the defendant had committed a breach of the agreement. (p 716 g-h)

[6] The evidence showed that the presence of the slope had reduced the value of the land to RM140,000 *ie*, at RM9.50 per sq foot. Since the plaintiffs had purchased the land at RM14 per sq foot, the loss in value of the land per sq foot is RM4.50. The loss in value of the whole land, therefore, is RM66,068.82 being 14,681.96 x 4.50. The plaintiffs were entitled to recover this amount from the defendant. (p 717 f)

[Judgment for plaintiffs.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors [1995] 3 CLJ 639 CA ***(refd)***

Brown v. Dunn [1893] 6 R 67 ***(refd)***

Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(foll)***

Lee Lim Huat v. Yusuf Khan Ghows Khan [1997] 3 CLJ 197 CA ***(foll)***

Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v. PP [2001] 7 CLJ 74 HC ***(refd)***

Reigate v. Union Manufacturing Co [1918] 1 KB 592 ***(refd)***

Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206 ***(refd)***

The Moorcock [1989] 14 PD 64 ***(refd)***

Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601 ***(foll)***

Legislation referred to:

Evidence Act 1950, ss. 5, 92, 136

Other source(s) referred to:

Chitty on Contracts, vol I, 28th edn, paras 13-004, p 644

For the plaintiff - Benjamin Yean; M/s Benjamin Yean & Co
For the defendant - Peter Gan; M/s Hock & Assoc

Reported by WA Sharif

JUDGMENT

Ahmad Maarop JC:

On 4 August 1999 the plaintiffs filed a writ of summons against the defendant. According to the statement of claim filed by the plaintiffs, their case against the defendant is as follows:

By an agreement in writing dated 29 April 1995, the defendant as a developer sold to the plaintiffs a bungalow plot identified as H.S (D) No. 26284, PT No. 4226, Mukim Bukit Katil, District of Melaka Tengah, Melaka measuring 14,681.96 square feet (1364 square metres) in the defendant's land development project at a purchase price of RM205,547.44 which was fully paid by the plaintiffs.

A temporary title to the said bungalow plot had been issued and registered in the names of the plaintiffs and the same was charged to the Bank of Commerce (M) Bhd to finance the purchase of the said bungalow plot.

It was an express term of the said agreement and/or by necessary implication that the bungalow plot was bought for the purpose of building a bungalow house or other similar dwelling within the confines of the available land area comprised in the said bungalow plot.

In or about March 1999 and whilst in the process of preparations of building their bungalow house or other similar dwelling the plaintiffs discovered that the said bungalow plot was substantially smaller than what was agreed to be the land area of the same.

Further and in the process of diminishing the land area of the said bungalow plot the defendant had erected/constructed a steep slope at the boundary thereof which was inherently dangerous and liable to collapse especially during inclement weather.

In the premises the plaintiffs were perforced to suspend their said preparations pending an explanation from the defendant as to the said discrepancy in the land area. Despite formal notice from the plaintiff's solicitors *vide* their letters dated 23 March 1999 and 5 April 1999 the defendant had failed, neglected and/or refused to provide any explanation as aforesaid and/or remedied the said discrepancy.

The plaintiffs were ready, willing and able at all material times to build their bungalow house or other similar dwelling on the said bungalow plot if the land area of the same was correct as agreed and prescribed under the said agreement and the said temporary title.

By reason of the aforesaid substantial breach of the said agreement by the defendant and the danger posed by the steep slope, the plaintiffs had been deprived of what was promised to them under the said agreement and/or had suffered substantial loss and damage arising therefrom.

The plaintiffs prayed for the following orders:

(a) Specific performance of the said agreement dated 29 April 1995 to the extent that the defendant do restore the original land area of the said bungalow plot or otherwise replace the said bungalow plot with another plot of similar or larger size;

(b) Further or alternatively, damages in addition to or *in lieu* of specific performance to be assessed;

(c) alternatively, a refund of such proportion of the purchase price as the court shall deem fit and just;

(d) Interests,

(e) Costs.

The trial started on 21 September 2000. The following witnesses testified for the plaintiffs:

(1) Lee Ah Kau, a licensed surveyor, (SP1),

(2) Ong Chong Wah, the first plaintiff (SP2),

(3) Khor Siew Suan, a registered valuer (SP3) and

(4) Muralitaran s/o P. Subramaniam, an engineer (SP4).

The defendant called the following witnesses to testify:

(1) Ooi Kah Huat, an engineer (SD1),

(2) Lee Weng Lip, a sub-contractor, (SD2) and

(3) Datuk Tan Koh Sui, a developer (SD3).

As stated in the statement of agreed facts, the following material facts were agreed to by the plaintifs and the defendant:

(1) The plaintiffs are purchasers of a plot of land identified as Lot No. 4226 (Now lot No. 6142) pursuant to a sale and purchase agreement dated 29 April 1995 entered into between the plaintiffs as buyers and the defendant as seller.

(2) The defendant are developers of a scheme consisting of vacant bungalow plots, of which Lot. No. 4226 is one, in the mukim of Bukit Katil, District of Melaka Tengah, Melaka.

(3) Lot No. 4226's land area is represented to be 14,681.96 square feet (1364 sq. metres) under the sale and purchase agreement and the separate issue document of title H.S.(D) 26284 No. P.T. 4226 Mukim Bukit Katil, Daerah Melaka Tengah.

(4) The plaintiffs had paid the total purchase price of RM205,547.44 to the defendant for Lot No. 4226 calculated at RM14 per square foot based on a land area of 14,681.96 square feet.

(5) It was an express term of the sale and purchase agreement and/or by necessary implication that Lot No. 4226 was bought for the purpose of building a bungalow house or other similar dwelling within the confines of the available land area comprised in the said lot.

It cannot be disputed that out of the total 14,681.96 sq. feet, what the plaintiffs eventually got when vacant possession of the lot was delivered to them was 9,073 sq. feet (843 sq. metres) of flat land, and 5606 sq. feet (521 sq. metres) of sloped land. This is clear from the evidence of SP1, the licensed surveyor employed by the plaintiffs to conduct demarcation and spot level survey of the land. SP1 prepared a survey plan (exh. P4). Referring to exh. P4, SP1 testified that the area marked A on lot 6142 (the said lot) was made up of flat land measuring 9073 sq. feet (843 sq. metre). The area marked B on the said lot was sloped land measuring 5606 sq. feet (521 sq. meter). According to SP1, the line marked with figure 59.66 was the top cutting of the slope and bottom cutting of the slope was at the same level as the road shown in exh. P4. The difference between the top cutting and the bottom cutting was about 42 feet. The evidence of SP1 on this was not disputed by the defendant.

The first plaintiff testified that as a local boy, he wanted to come back and do his business in Malacca. As a software designer he could work anywhere. According to the first plaintiff, as he was staying in Kuala Lumpur most of the time, he had asked his sister in Malacca to look for a piece of land as big as possible because he wanted to build a house with nice greenery and landscaping. According to him because of the nature of his work, he had to stay in the house most of the time. What he wanted was a very nice and comfortable house. According to him from time to time he could take back his work and do gardening and landscaping around the house. The first plaintiff also said that he would prefer the house to occupy about 3000 sq. feet. The

rest of the land would be landscaping. He was hopeful that there could be an area to build a pond. The first plaintiff produced plans for the house which he drew himself before he saw the site (exh. P5 A-C).

According to the first plaintiff, he was not able to fulfill his expectation because he did not have enough land for the garden that he had planned and to do the landscaping. This was because the flat land (9073 sq. feet) was the only land he could work on. According to him the slope was very dangerous.

The first plaintiff also testified that he had seen the mock-up of the land. He said what he saw from the mock-up was a flat piece of land. But what he saw on the actual land was that a certain was flat and the other part was sloped land. After confirming that there was a slope on his land, the first plaintiff instructed his lawyer to check with the developer (the defendant). His lawyer sent a letter (exh. P6) to the developer but he received no response from the developer.

The first plaintiff further said that only about 9,000 sq. feet of the land was available to him. He admitted that he could do a lot on 9,000 sq. feet but he could not do what he had originally planned to do. According to him, in this case the defendant had to compensate him for the 5,000 sq. feet of land which was taken away by the slope. The first plaintiff also said that the presence of the slope on his land made his land smaller and this was what he was unhappy about.

The relevant part of SD3's evidence is as follows:

SD3 was the Managing Director of the defendant company. According to SD3 he had been a developer since 1977. SD3 said the first plaintiff became interested to buy the bungalow plot through his sister who was then working as a planner in Malacca Municipal Council. The land was sold to the plaintiffs cheaper through the recommendation of his sister. SD3 said he could sell the lot to the plaintiffs at a price more expensive than the price actually paid by him. SD3 did not agree that the plaintiffs' lot was only worth RM9 per sq. foot because, according to him it was a freehold land and that the number of such lots of land was limited. SD3 said if the plaintiffs had offered to sell back the land at RM10 per sq. foot he would be prepared to buy the land back at any time. SD3 also said that when he received the letter of demand from the plaintiffs' lawyers, he was disappointed because he had already given RM3 discount to the plaintiffs. When asked whether he could still sell at RM14 per square foot if he were required to build retaining walls, SD3 said that if he had to build retaining walls the price of the land would be RM25 to RM30 per square foot and that only at RM25 per square foot would he be able to make some profits.

Under cross-examination, SD3 said that in every bungalow lot there was a slope and that all bungalow lots were sloped land.

SD3 said he would not know whether the fact that there was a slope on the plaintiffs' lot was made known to them, but according to SD3 the slope was there all the time.

SD3 agreed that in 1995, he knew he was selling 5,606 sq. feet of slope at RM14 per square foot to the plaintiffs.

SD3 also agreed that unless the plaintiffs somehow reclaim the slope he could never build on the area comprised in the slope. SD3 also agreed that in conclusion the plaintiffs received about 9,000 sq. feet to build his house.

Under re-examination, SD3 said that the plaintiffs got the same acreage of land sold to him under the sale and purchase agreement (14,681.96 sq. feet.) SD3 also said that because of the presence of the slope, he specifically put a condition in the sale and purchase agreement for the plaintiffs to build retaining walls. According to SD3, once retaining walls were built, the plaintiffs would have flat surface on the entire plot of his bungalow plot.

According to learned counsel for the plaintiffs, the case for the plaintiffs was simply this: they had paid RM205,547.44 for the price of a bungalow plot measuring 14,681.96 sq. feet (ie, RM14 per sq. foot, which was bought for the specific purpose of building a bungalow or similar dwelling. This was pleaded in paras. 3 to 5 of the statement of claim, which were admitted by the defendant in its statement of defence. The thrust of the plaintiffs' submission was that the plaintiffs did not get 14,681.96 sq. feet which was promised by the defendant under the sale and purchase agreement dated 29 April 1995, to build his bungalow or other similar dwelling.

The plaintiffs contended that when the defendant delivered the land to them, what they eventually obtained was 9073 sq. feet of flat land and 5606 sq. feet of sloped land. It was their contention that the existence of the slope on the land (ie, resulting in 5606 sq. feet of sloped lands) constituted a breach of contract on the part of the defendant. Learned counsel for the plaintiffs submitted that if the land was sold without more (ie, without any condition), then the plaintiffs would not succeed because the principle of caveat emptor would apply. But in this case according to learned counsel for the plaintiffs, the land was bought for a specific purpose of building a bungalow. In other words, when they signed the sale and purchase agreement, the plaintiffs expected and were supposed to get 14,681.96 sq. feet to build his house. Since they eventually obtained 5606 sq. feet of sloped land out of the total area of the land, the plaintiffs did not get what they had bargained for. The plaintiffs urged

the court to imply a term in the sale and purchase agreement that they were supposed to get 14,681.96 sq. feet of buildable area (ie, flat land) to build his house on. According to learned counsel for the plaintiffs, the sale and purchase agreement did not expressly provide so but the plaintiffs had paid the purchase price of RM205,547.44 on that basis and understanding.

In his submission, in response to the plaintiffs' allegation that the defendant did not inform him of the existence of the slope and that the sale and purchase agreement did not mention that slope could be created, learned counsel for the defendant contended that there was no fiduciary relationship between the plaintiffs and the defendant. He submitted that the first plaintiff was a highly educated person and the agreement had been entered at arm's length. There was no obligation on the part of the defendant to protect the plaintiffs' interest. Learned counsel for the defendant added that if the plaintiffs had exercised ordinary diligence by visiting the site, they would have discovered that there would be slope on the land. The first plaintiff had entrusted his sister to look for the bungalow lot. If the plaintiffs had not exercised caution they had to bear the risk.

In his reply to the plaintiffs' submission that the defendant had failed to deliver vacant possession of the bungalow lot with flat land (without the slope), learned counsel for the defendant submitted that the defendant had never promised (whether orally or in writing) to sell the bungalow lot with 14,681.96 sq. feet of flat land. He referred to the title to the said land (at p. 32 Ikatan B, Ikatan Dokumen yang dipersetujui) and submitted that the title showed that that acreage of the land was 1364 sq. meter (14,681.96 sq. feet). According to him, this was the exact acreage purchased by the plaintiffs under the sale and purchase agreement. So, learned counsel for the defendant submitted that the plaintiffs could not be heard to say that there had been a reduction in the acreage of bungalow lot given to them. The plaintiffs had in fact and in law obtained the total acreage which they purchased under the sale and purchase agreement.

Learned counsel for the defendant further submitted that the bungalow lot consisted of two portions: (i) the flat surface of 9,073 sq. feet (843 sq. meter) and (ii) the sloped portion of 5,606 sq. feet (521 sq. meter). He then drew the court's attention to the fact that the first plaintiff in his evidence said that he had intended to build a bungalow occupying an area of about 3,000 sq. feet. Learned counsel for the defendant therefore submitted that there would still be 6,073 sq. feet of flat land left for the plaintiffs to do landscaping, gardening and build a pond.

It was also submitted on behalf of the defendant that the plaintiffs had not bargained for the bungalow lot to have 14,861.96 sq. feet of flat land. The plaintiffs did not at any time indicate to the defendant that they would like to buy a bungalow lot with the entire area made up of flat land. It was submitted that there was nothing in the sale and purchase agreement which stated that the entire area of the lot would be flat land and that there would be no slope. In fact, according to learned counsel for the defendant, from cl. 6.1.3 of the sale and purchase agreement, it could be implied that the plaintiffs and the defendant had agreed that there would be slope on the land. If not there would be no necessity of having a provision in the sale and purchase agreement which required the plaintiffs to build retaining walls.

It was also the defendant's contention that it had never been the contractual intention on the part of the defendant to sell the bungalow lot with the land area consisting of entirely flat land. It was contended by the defendant that if the plaintiffs wanted the court to imply such a term in the sale and purchase agreement, the plaintiffs must establish that that was the intention of both parties. In this connection learned counsel for the defendant submitted that the sale and purchase agreement was complete, effective and workable without the term which the plaintiffs wanted the court to imply.

In my view the main issue before the court is whether it should imply in the sale and purchase agreement the term that the entire 14,681.69 sq. feet of land sold to the plaintiffs thereunder must be flat land.

As a starting point in the consideration of the main issue, I have reminded myself that the court cannot rewrite the sale and purchase agreement executed by the plaintiffs and the defendant. The court will only imply such term or terms as may be necessary to render the agreement effective or complete in the manner in which the plaintiffs and the defendant are presumed to have intended. This was made clear in *Lee Lim Huat v. Yusuf Khan bin Ghows Khan* [1997] 3 CLJ 197 where at p. 211 the Court of Appeal said:

> That the approach we have adopted does not depart from settled jurisprudence is evidenced by the following passage appearing at p. 81 of *Law and Practice of Compromise* (4th edn) by David Foskett:
>
> > In addition to problems caused by imprecise drafting, parties may omit to include in their agreement a term which is necessary to render it effectual or complete. In these circumstances, *the court will be prepared to imply such term or terms as may be necessary to render the agreement effective or complete in the manner in which the parties are presumed to have intended.* The court cannot, however, rewrite the parties' agreement, a principle sometimes overlooked by those contending for the existence of an implied term.

Similarly, in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, at p. 609 Lord Pearson said:

> Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: **it must have been a term that went without saying, a term necessary to give business efficacy to the contract,** a term which, though tacit, formed part of the contract which the parties made for themselves.

That a term will be implied if it is necessary to give efficacy to a contract was also stated by Bowen LJ in the well known case of *The Moorcock* [1989] 14 PD 64 at p. 68:

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, **the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side**; and I believed if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.

The term "business efficacy" was explained by Scrutton LJ in *Reigate v. Union Manufacturing Co* [1918] 1 KB 592 at p. 605:

> A term can only be implied if it is necessary in a business sense to give efficacy to the contract; that is, if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties, what will happen in such a case?", they would have replied, "of course, so and so will happen; we did not trouble to say that; it is too clear".

The court will be prepared to imply a term if it arises from the language of the agreement itself, and the circumstances under which the agreement was entered into. (*Chitty On Contracts*, 28th edn, vol. I, para. 13-004, p. 644).

With those principles in mind I turn to the facts and circumstances of this case. The starting point is the sale and purchase agreement. As I have said elsewhere in this judgment, the parties admitted that area of the plot in question represented in the sale and purchase agreement was 14,681.96 sq. feet and that it was a term of the agreement (either expressly provided or by necessary implication) that the land was bought for the purpose of building a bungalow or other similar house. There is no provision in the agreement which expressly provides that there shall be no slope on the land. But there is also no provision which clearly provides that there shall be slope on the land. There is also no express provision thereunder which provides that the entire 14,689.96 sq. feet of the land shall be flat land or that the entire 14,681.96 sq. feet of the land shall be in a condition ready, fit and suitable for the construction of a bungalow, without the need to undertake any remedial works on any part of the land. Learned counsel for the defendant referred to cl. 6.1.3 of the sale and purchase agreement and submitted that by implication that clause showed that the parties had agreed that there would be a slope. Clause 6.1.3 provides:

> All internal driveway, subsoil drains and sewage system within the bungalow plot and **retaining walls** shall be constructed by the purchaser at his own cost and expenses.

Infact there is another clause in the sale and purchase agreement which should also be considered in deciding whether the parties had indeed agreed that there would be slope on the land. Paragraph 3.1 in the seventh schedule to the sale and purchase agreement provides that:

> The vendor shall carry out earthworks on the bungalow plot as may be necessary in a terrain like manner taking into account the nature and **slope** of the bungalow plot and its surrounding. The developer shall also carry out such levelling and earth-filling as may be required by the project engineering.

In view of cl. 6.1.3 and para. 3.1 in the seventh schedule, I am prepared to conclude that the parties had agreed that the plaintiffs' land would be on a high ground. I am also prepared to accept the submission that since the land would be on high ground there would be slope on the land. On the invitation of the parties I had visited the site on 9 January 2001. I found that the plaintiffs' land was on a hill. The general view of the land is as shown in the three photographs enclosed in the valuation report (exh. P8) prepared by SP3. The first photograph shows the flat surface of the land in relation to surrounding areas on top of the hill. The second photograph is the closer view of the flat

area of the land and the upper portion of the slope (the first tier). The third photograph shows the view of the slope from the tar road located at the same level as the terrace houses at the foot of the slope. Photographs A to I (exh. P3 A-I) are more photographs showing the said lot, the slope and the terrace houses. As could be seen from photographs A, B, C, E, F, G (p. 6-8 Ikatan C), the plaintiff's land is located at a place which is higher than the terrace houses shown at the foot of the slope. Considering the location of the plaintiffs' land and existence of the slope, I conclude that the purpose of the retaining walls which the plaintiffs were obliged to build was to retain and strengthen the slope so that it would not collapse or become eroded or washed down thus affecting the terrace houses at the foot of the slope. However, I am not prepared to go further and conclude that because there would inevitably be a slope and retaining walls, the area of the land available for construction to be delivered under the agreement could be less than 14,681.96 sq. feet. The presence of the slope does not mean that the total area of the land can be substantially reduced. The presence of the slope and the reduction of total area of the land are two different things. The defendant contended that although 5606 sq. feet of the land was taken up by the slope, in terms of total area, the plaintiffs still obtained 14,681.96 sq. feet of land. Indeed the title still shows the total area to be 14,681.96 sq. feet. But then what is the point when the said 5606 sq. feet of sloped land cannot be used to build anything on? Even the defendant's managing director (SD3), under cross-examination agreed that unless the plaintiff somehow reclaim the slope he could never build on the area occupied by the slope. In other words it is not too much to say that, unless the slope is reclaimed, the 5606 sq. feet of sloped land is practically useless. I hasten to add that unlike the sale and purchase agreements tendered as exhs. D10B and D10C, the sale and purchase agreement executed by the plaintiffs and the defendant in this case does not contain special terms and conditions. Clause 25 in exhs. D10B and D10C provides:

> The sale is subject to the Special Terms and Conditions set out in the Annexure hereto. In the event that any of the terms and conditions in the Annexure hereto shall be inconsistent with the terms and provisions of the other Clauses in these present, the terms and provisions of the Special Terms and Conditions shall prevail but only to the extent that they are inconsistent therewith.

The special term and condition specified in the annexure to D10B and D10C is as follows:

> The purchaser hereby acknowledge that the said property is sold in its present state and condition.

Clause 13 in D10B and D10C provides:

> The description of the said Property is believed and shall be deemed correct and no objection or requisition shall be made on account of any error of minor nature in description of the said Property as well as to the quantity of the land.

None of the above clauses is found in the sale and purchase agreement in this case. The presence of the sloped land could have been stated under the third schedule to the sale and purchase agreement (the schedule on description of land). Nothing to that effect was provided or hinted thereunder. Instead the third schedule appears as follows:

DESCRIPTION OF BUNGALOW PLOT

Lot No	:	4226
Title	:	HS(D) No. 2 4284
Area (sq. feet)	:	14,681.96
PRICE PER SQ. FOOT	:	RM14.00
PURCHASE PRICE	:	RM205,547.44

As I have stated earlier, under cross-examination, SD3 admitted that in 1995, he knew that the defendant was selling 5606 sq. feet of slope at RM14 sq. feet to the plaintiffs. SD3 also said that the land was sold to the plaintiffs below market price because of the slope. In order to lay the foundation for the defence that lot 4226 (lot 6142) was sold to the plaintiffs at a price cheaper than the neighbouring lots, SD3 testified that lot 6141 (PT 4225) was sold at the price of RM17 per square foot. SD3 also said that lot 6140 (PT 4224) and lot 6146 (PT 4230) were sold at RM18 per sq. foot and RM21 per sq. foot respectively. The sale and purchase agreements for these three lots of land were produced in evidence and marked as exh. D10A, D10B and D10C. At this stage I must add that although exh. D10A, D10B and D10C indicate the purchase prices of the three lots of land concerned, I do not think D10A, D10B and D10C provide sufficient evidence to show on the balance of probability, that the purchase price of RM14 per square foot paid by the plaintiffs for lot 4226 was a discounted price. This is because although lot 4224, 4225 and 4230 were plots in the same project, there are no sufficient particulars to show in terms of description and characteristics, that the three lots are similar to lot 4226 and are therefore comparable. Moreover there is no evidence given to show that the nature of the transactions relating to the three lots is similar to and therefore comparable to lot 4226.

Next, the defendant, through the evidence of SD3 tried to introduce the evidence that the land was sold to the plaintiffs cheaper through the recommendation of the first plaintiff's sister. This was objected to by learned counsel for the plaintiffs, who contended that the evidence was irrelevant, unless the defendant would be calling the first plaintiff's sister to say that the plaintiffs had asked for the cheaper rate. Learned counsel also relied on s. 92 of the Evidence Act 1950. He submitted that as there was a written agreement in this case, it must be relied upon. He also contended that extraneous evidence to explain or contradict the written agreement should not be allowed. He also said that no notice had been given to the plaintiffs by the defendant to say that this would be raised as a defence. As such the plaintiffs would not be able to respond in any way as the plaintiffs had closed their case. Learned counsel for the plaintiffs also submitted that the defendant was bound by its pleading. He also submitted that the line of questioning about the first plaintiff's sister should also be excluded on the ground of hearsay.

Learned counsel for the defendant submitted that the defendant wanted to introduce the background to show how the plaintiffs became interested in purchasing the land. He argued that only material facts need to be pleaded: the recommendation of the first plaintiff's sister was not material at all but was merely an item of evidence to show the decision making process on the part of the plaintiffs in buying the said lot. Learned counsel for the defendant also contended that the question of relevancy did not come into the picture at that stage. He said, the question of relevancy would come into the picture when the court sift through the evidence later.

With respect I do not agree. Under s. 136 of the Evidence Act 1950 read with s. 5 of the same Act, the trial judge is empowered to permit only such evidence to be given which in his opinion was relevant and admissible. The judge does not have to hear the evidence objected to and then later, after it is completed and after much time is wasted, decide whether the evidence is relevant and admissible. Questions of admissibility of evidence are questions of law and determinable by the judge. If it is his duty to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence (*Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v. Pendakwa Raya* [2001] 7 CLJ 74). In the first place, without the first plaintiff's sister coming to the court to testify, the evidence on what she was alleged to have said or recommended is hearsay. Secondly, it is trite law that parties are bound by their pleadings. In this connection, I do not find anything in the statement of defence to show that the defendant had pleaded that the land was sold to the plaintiffs at a cheaper price because of the recommendation of the first plaintiff's sister. Further, I find that the allegation that the land was sold cheaper to the plaintiffs because of the recommendation of the first plaintiff's sister was never put to the first plaintiff

(SP2) when he was giving evidence. If it was a genuine defence and so crucial to the defendant's case it should have been raised or at least put to SP2. Failure to do so in the absence of valid explanation (and none was offered in this case) would constitute another reason to stop the defendant from raising it in evidence as a defence. (*Chua Beow Huat v. PP* [1970] 2 MLJ 29, *Brown v. Dunn* [1893] 6 R 67 and *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & 3 Ors* [1995] 3 CLJ 639). In my view, the reasons as aforesaid or indeed any of them serve as sufficient grounds for the court to disallow the evidence that the land was sold cheaper to the plaintiffs because of the recommendation of the first plaintiff's sister. Accordingly I disallowed that evidence or the line of questioning concerning the recommendation of the first plaintiff's sister.

With the court's ruling as aforesaid, the emphasis on the recommendation of the first plaintiff's sister had to be abandoned by the defendant. Next, the evidence of SD3 assumes a slightly different colour. SD3 said that he would be able to sell the lot to the plaintiff at a price higher than the price actually sold to him. SD3 did not agree that the plaintiffs' lot was only worth RM9 per sq. foot, because, according to him, it was a freehold land and the numbers of such lots were limited. SD3 said if the plaintiffs had offered to sell back the land at RM10 per sq. foot, he would be prepared to buy back the land at anytime. SD3 also said when he received the letter of demand from the plaintiffs' lawyer he was disappointed because he had already given RM3 discount. He said he could not sell the land at RM14 per. sq. foot if he had to build the retaining wall. According to him, if he had to build the returning wall, the price of the land would be RM25-RM30 per sq. foot. Only at RM25 per sq. foot would he be able to make some profit. This line of defence was reinforced by SD3 in his evidence under cross-examination. The relevant part of the cross-examination runs as follows:

Q: Since you know there was a slope when you intended to sell lot 6142 in 1995, why did not you sell only the flat part of the land without the slope?

A: I sold the land below market price because of the slope.

Q: Is it correct to say that in 1995, you know you were selling 5606 sq. feet of slope at RM14 per sq. feet to the plaintiffs?

A: Yes.

Q: You would agree with me that unless the plaintiff somehow reclaim the slope he could never build on the area comprised in the slope?

A: Yes.

Q: You would agree in conclusion that the plaintiff received 8,000 sq. feet to build his house?.

A: Yes.

From the evidence of SD3, it is clear that in answer to the plaintiff's claim, the defendant contended that the price of RM14 per sq. foot was a discounted price and that the land was sold at that price (which according to SD3 was below market price), because of the slope which had reduced the flat land area to 9703 sq. feet. This defence appears to be crucial to the defendant's case. In fact it was pursued to the end in the submission of learned counsel for the defendant. But the essential question is this: was that defence pleaded in the statement defence? I have considered the statement of defence but I find nothing therein to show or from which inference could be made that such a defence was pleaded. Further, this defence, which was so crucial to the defendant was also never raised with or put to the first plaintiff when he gave evidence. Again I am compelled to say that such a failure, in the absence of a valid explanation would be another reason to bar the defendant from raising it in its defence (*Chua Beow Huat, Browne v. Dunn* and *Aik Ming (M) Sdn Bhd v. Chang Cheng Chuen*). In the circumstances, the probability that such a defence was an afterthought cannot be ruled out. Even if the evidence of SD3 on the issue of "the price was discounted because of the existence of the slope" could be considered, the question is whether the plaintiffs were aware of this? Was it also the understanding of the plaintiffs when they entered into the agreement, that they were given a discounted price of RM14 per sq. foot because there would be a slope on the land and that they would get only 9703 sq. feet of flat land? The first plaintiff in his evidence under cross-examination, said that the defendant did not tell him that there would be slope on the land. Earlier, in examination in chief, the first plaintiff said that he had seen the mock-up of the land. What he saw from the mock-up was a flat piece of land. Under cross-examination, when asked whether his sale personnel had been instructed to inform potential buyers that there were slopes on the bungalow lots, SD3 said he could not recall, but said that model in the defendant's office showed that there were slopes on the bungalow lots. In other words, SD3 could not say whether buyers were informed of the existence of the slopes. In his evidence under examination in chief, specifically with reference to the plaintiffs' lot, SD3 said that he would not know whether the fact that there was a slope on the plaintiffs' land was made known to them but he said that the slope was there all the time. If the model in the defendant's office had been produced, then perhaps it would throw more light on the issue as to whether there was a slope on the plaintiffs' lot. Unfortunately, the defendant did not produce the mock-

up in court and no explanation was given. I conclude that the defendant had failed to show on the balance of probability, that the mock-up showed slopes on the bungalow lots. I hold further that the first plaintiff's evidence that from the mock-up what he saw was a flat piece of land remains unrebutted.

I have already said that the existence of the slope and the reduction in the total area of the land are two different things. In order to be representative of the contracting parties' intention that the 14,681.96 sq. feet could include 5606 sq. feet of the sloped land in this case, there must be express provision to that effect. In my view mere mention of "retaining wall" and "slope" in the sale and purchase agreement is not sufficient to capture and convey that intention. I am of the view that the entire 14,681.96 sq. feet of land purchased by the plaintiffs under the sale and purchase agreement must be available and ready for construction. By "available and ready for construction", I mean the entire 14,681.96 sq. feet must be in a condition fit, suitable and ready for construction of a bungalow or other similar dwelling without the necessity of doing any remedial works to improve the condition of the land. In order to be in such a condition, the entire 14,681.96 sq. feet of the land in this case must be flat land as shown in the first photograph in exh. P8 and the photographs in exh. P3 H-I. If a substantial portion of the land (in this case some 38%) is sloped land as shown in the third photograph in exh. P8 and the photographs in exh. P3 A-G, then in my view, it could not be said that the entire 14,681.96 sq. feet is in the condition that it was available and ready for construction. This is because, as I have said, even SD3 admitted that unless the plaintiff reclaim the slope he could never build on the area occupied by the slope. In my view it would be pointless to buy a bungalow lot with the total area of 14,681.96 sq. feet, out of which 38% would be taken up by the steep slope, resulting in 5606 sq. feet of the land being practically useless to build or do anything on, unless extensive and expensive remedial works are undertaken to reclaim same. In my judgment although in the title to the land, the total area is still recorded as 14,681.96 sq. feet, in effect the available land area has been reduced by 38% per cent. The fact that the land was on a hill, that there would be a slope and that retaining walls would have to be built does not mean that the defendant could reduce the land area available for construction. In this case the area available for construction in the sense I have explained earlier, was reduced by 38% of the total area. It must be borne in mind that the plaintiffs was not buying a plot of land for the purpose of turning it into a quarry or some other purposes in respect of which the flatness of the land would not be essential. They were buying a plot of land to build a bungalow. They were therefore entitled, under the sale and purchase agreement, to obtain 14,681.69 sq. feet of land suitable not only to build their bungalow, but also to do landscaping and other things necessary to enable them to enjoy and use

the land as registered owners. The fact that the first plaintiff had admitted in evidence that the bungalow would occupy only 3,000 sq. feet and that he would still have 6,000 sq. feet for his landscaping and garden does not mean that the defendant was entitled to deliver to the plaintiffs, a plot, of which 38% of the total area was sloped land. I think the size of the house the plaintiffs wanted to build does not matter. The fact is they bought a plot of land measuring 14,681.69 sq. feet to build a bungalow. He did not intend to buy a plot in respect of which 5606 sq. feet would be sloped land, which would entail substantial expenses which might amount to more than the price of the land itself, to make the entire area of the land available and ready for construction. In my view considering the circumstances of this case, the contract entered between the parties in this case is the type in respect of which the buyer expects the whole area to be flat land. And the seller knew this. However there is no provision in the sale and purchase agreement expressly providing for such a term. The question is whether the court should imply such a term in the sale and purchase agreement?

In order to answer this question, it is useful to refer to *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206. In that case by an agreement dated 21 December 1993, the first defendant (the company) appointed the plaintiff, who was then a director, to be managing director for a term of ten years. Article 91 of the first defendant's articles of association provided that a managing director should "subject to the provisions of any contract between him and the company be subject to the same provision as to removal as the other directors of the company and if he cease to hold the office of director he shall *ipso facto* and immediately cease to be a managing director". Article 105 gave the company power to remove a director before the expiration of his period of office. In 1935 the second defendant (the Federated Companies), which was a company formed to take over the shares of a number of companies, including the first defendant, acquired all the shares of the first defendant. By a special resolution passed on 17 April 1936, the existing articles of association of the first defendant were abrogated and new articles adopted. Article 8 empowered the second defendant by an instrument subscribed by two directors and the secretary to remove any director of the company. Article 9 provided that a director need not hold a share qualification. The new articles incorporated a large part of Table A, including art. 68, which made a managing director's appointment subject to determination *ipso facto* if he ceased to be a director. On 27 March 1937, an instrument subscribed as above was delivered to the first defendant removing the plaintiff from the office of director, and the first defendant thereupon treated him as ceasing to be managing director. The plaintiff sued the first defendant for wrongful repudiation of the agreement and the second defendant for wrongly procuring, causing or inducing the first

defendant's breach of the agreement. Humphrey J awarded damages against both the defendant. On appeal to the Court of Appeal, it was held (1) that it was an implied term of the agreement dated 21 December 1933, that the first defendant should not remove the plaintiff from his position of director during the term of years for which he was appointed managing director, (2) that it was an implied term that the first defendant would not alter its articles of association so as to create a right in the first defendant or any one else to remove the plaintiff from his position of director during the same term of years. The decision of the Court of Appeal was affirmed by the House of Lords [1940] AC 701.

In the Court of Appeal, Mac Kinnon LJ explained a test which may serve as a useful guide in resolving the issue as to whether a term should be implied in an agreement or not. At p. 227, the learned judge said:

> For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: "*Prima facie* that which in any contract is left to be implied and need "not be expressed is something so obvious that it goes without "saying; so that, if, while the parties were making their "bargain, an officious bystander were to suggest some express "provision for it in their agreement, they would testily "suppress him with a common 'Oh, of course!"'.

The learned judge then went on to apply the test in the case before him (pp. 227-228):

> Applying that in this case, I ask myself what would have happened if, when this contract had been drafted and was awaiting signature, a third party reading the draft had said:
>
> > Would it not be well to put in provision that the company "shall not exercise or create any right to remove Mr. Shirlaw "from his directorship, and he have no right to resign his "directorship?" I am satisfied that they would both have assented to this as implied already, and agreed to its expression for greater certainty. Mr. Shirlaw would certainly have said: "Of course that is implied. If I am to be bound by this "agreement, including the barring of my activities under "clauses 11 and 12 when I cease to be managing director, "obviously the company must not have, or create, the "power to remove me at any moment from the Board "and so disqualify me from that post"; and the company, which must be presumed to have been desirous of binding him to serve them as managing director for ten years, would, I think, with equal alacrity have said: "Of course that is implied. If you were tempted by some "offer elsewhere, it would be monstrous for you to be able "to resign your directorship and, by so disqualifying "yourself from being managing director, put an end to this "agreement"."

Applying the above test in this case, I ask myself what would happen if when the sale and purchase agreement was awaiting signature, a bystander reading the draft agreement had said: "This plot of land is on a hill. Would it not be well to put a term that the entire area of 14,681.96 sq. feet of land to be delivered under this agreement shall be flat land so that it will be in condition fit, suitable and ready for construction to commence". I am satisfied that in all probability the plaintiffs and the defendant would have agreed with this as implied and agreed to its expression to avoid misunderstanding later. The plaintiffs would certainly have said: "Of course that is implied. The purpose of buying the bungalow plot is to build a bungalow or similar dwelling. Since we are buying a bungalow on a high ground and would have to incur additional expenditure to build the retaining walls, apart from having to pay RM205,547.44 for the price of the land, we are entitled to receive the plot with its entire area made up of flat land so that it is in the condition fit, suitable and ready for us to start the construction of the bungalow and do other things necessary to enable us to enjoy and use the land as every land owner should"; and the company, which must be presumed to have been desirous to make the sale successful, would I think, have said: "Of course that is implied. Although your land would be on a hill and that you would have to build retaining walls, we will not be discharging our contractual obligation if we give you anything less than 14,681.96 sq. feet of flat land for you to start building your house, garden, do landscaping and other things necessary, to enable you as registered owners, to have the expected full enjoyment and use of the land, without having to incur additional expenditure to improve the condition of the land, other than to build the retaining walls. We realise that if this is not implied you would not have agreed to go on with the purchase. After all this agreement is not subject to the special term and condition that the plot is sold in its present state and condition".

In my judgment, considering the sale and purchase agreement in this case, the purpose for which the land was bought and other circumstances of the case, the term that the entire 14,861.96 sq. feet of land under the agreement must be flat land, is necessary to make the agreement effective and complete. I am satisfied on the balance of probability that it is a term which must have been too clear or obvious to the plaintiffs and the defendant. In the result I hold that it was an implied term of the sale and purchase agreement that the entire area of the bungalow plot to be delivered to the plaintiffs must, at the time of delivery, be flat land so that it is in the condition fit, suitable and ready for construction on it to commence. By delivering to the plaintiffs the plot of land with 5606 sq. feet of sloped land, the defendant had committed a breach of the sale and purchase agreement.

Damages

As could be seen from the discussion of liability in this case, when the land was delivered to the plaintiffs, out of the total area of 14,681.96 sq. feet, 5606 sq. feet were occupied by the slope. I have held that this constituted a breach of the agreement on the part on the defendant.

According to the registered valuer (SP3) who gave evidence of the valuation of the land for the plaintiff, she visited the site on 13 October 2000. She noticed that the property had been levelled. Part of the land sloped steeply towards the metalled backlane of some newly constructed double storey terraced houses. According to SP3 her valuation was based on the comparison method which entailed analysis of recent evidence of values of comparable properties in the neighourhood and making the necessary adjusments for differences. In this case SP3 had made adjustment for location, land size and the shape of the land which were in fact the favourable factors of the land. According to SP3 the only unfavourable factor of the land was its terrain; ie, sloping downwards towards the back lane of some terrace houses. This, according to SP3 made a difference. SP3 fixed the value of the whole land including the slope to be RM140,000 (9.50 per sq. foot).

In his evidence, SD3 did not agree that the price of the lot sold to the plaintiffs was RM9.50 per sq. foot. He said in late 1999 he had sold a lot at RM21 per sq. foot. The defendant did not produce any valuation report or evidence to challenge the valuation made by SP3. No particulars were given even on the lot which was sold by SD3 in 1999 for RM21 per sq. foot. In the circumstances, I accept the evidence of valuation given by SP3.

I conclude that the presence of the slope had reduced the value of the land to RM140,000 (RM9.50 per sq. foot). The plaintiffs had paid to the defendant RM205,547.44 (RM14 per sq. foot) for the whole land. The loss in value of the land per one sq. foot is RM4.50. The loss in value of the whole land is therefore RM66,068.82 (based on the formula RM14,681.96 x 4.50). In my judgment that is the amount of damages which the plaintiffs are entitled to recover from the defendant.

Conclusion

Judgment is entered for the plaintiffs. The defendant is ordered to pay to the plaintiffs:

(1) Damages amounting to RM66,068.82 (based on the formula 14,681.96 x 4.50),

(2) Interest at 8% per annum from 29 April 1995 until the date of full settlement, and

(3) Costs.